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No. 96-1278

In the

Supreme Court of the United States

October Term, 1996

DOUGLAS A. CLARK and CHERYL CLARK,
Petitioners,

v.

CITY OF HERMOSA BEACH and CITY COUNSEL OF THE CITY OF HERMOSA BEACH,
Respondents.

Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I

INTRODUCTION

The City misunderstands the basic nature of the Clarks' argument. The Clarks are not complaining about a "deprivation of the right to reasonable use of the land," Opposition at 1, but are arguing that because there has been a deprivation of a right to a fair hearing, they deserve a meaningful remedy for *that* deprivation. In short, the Clarks are not claiming any "entitlement" to any particular permit, building height, or building configuration. They are asking that the hearing procedures used to fix restrictions on the use of their property be fair and, if they are not fair, that there be access to an adequate remedy as provided by 42 U.S.C. § 1983.

A. There Is a Final Judgment in This Case

The court below finally disposed of the Clarks' claim for damages and attorneys' fees under the Due Process Clause. The decision is quite clear. Under the interpretation of the court below, the Clarks have no right to procedural due process in government hearings on the permitted uses of their property. No rehearing on their permit will change this result. Nor will it alter the measure of damages. The Clarks allege that if they had been given a fair hearing on their permit application they would not have suffered higher construction costs, lower property values, and emotional distress. *See* Petitioners' App. A-15. That the permit could theoretically be denied at a subsequent hearing does not render the trial court any less capable of determining the damages caused by the unfair procedures.

In *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469 (1975), this Court explained that the finality doctrine could not be applied in a "mechanical fashion," 420 U.S. at 477, instead, the Court preferred "'a more liberal, and, as we think, a more reasonable construction.'" *Id.* at 480 (citing *Forgay v. Conrad*, 47 U.S. (6 How.) 201, 203 (1848)).

The present case easily falls within the ambit of *Cox Broadcasting*. "In the first category are those cases in which there are further proceedings--even entire trials--yet to occur in the state courts but where for one reason or another the federal issue is conclusive." *Id.* at 479. It is irrelevant that there will be a new

hearing on the Clarks' application, the federal issue of whether the constitution requires a fair hearing has been conclusively decided.

Cox Broadcasting also supports review in cases where the refusal of immediate review "might seriously erode federal policy." 420 U.S. at 482. The federal policy of protecting civil rights under Section 1983 is now inapplicable in California to individuals seeking to protect their right to a fair hearing when government restricts their ability to make use of their land.

Immediate review by this Court is necessary to restore the right of fair hearings.

The decision on the Clarks' due process-based claims is final.

B. All Relevant Claims Were Raised Below

The Clarks properly raised below all the claims and issues that are in their petition. The claims brought by the Clarks included a claim that they had been denied a fair hearing, that this denial deprived them of due process, and that this deprivation was a violation of 42 U.S.C. § 1983. App. A-12, C-9-15. Respondents suggest that because the Clarks focused more on their rights to the subject permit than on their underlying right to use their property, they never properly raised the claim below. That, of course, is untrue. The underlying claim is that there was a denial of the Clarks' right to due process in violation of Section 1983. That has not changed.

Pointing out that there is a property interest in the ownership of land and that due process must attach when restrictions are imposed on the use of land is *not* a different claim from that made below. Even if their *argument* is viewed as having been revised, it is not conceivably a new *claim*. Their claim is that there is a due process violation of their rights under Section 1983 because they were denied their due process rights to a fair hearing. Part of their argument in support of their claim is that they are entitled to the protections of the Due Process Clause since the hearing at issue implicated protected property interests. Merely placing greater emphasis on the underlying nature of their property right has nothing to do with raising a new claim.

Even if this were a brand new argument, which it is not, this Court has held that it is acceptable to raise in a petition for certiorari a new argument in support of an existing claim. *See, e.g., Lebron v. National Passenger Railroad Corp.*, ___ U.S. ___, 115 S. Ct. 961,

965 (1995). In *Yee v. City of Escondido*, 503 U.S. 519 (1992), this Court recognized, in the context of a takings claim, that it is proper to raise a new theory or argument in a petition for certiorari if that theory is in support of the same claim:

> Petitioners' arguments that the ordinance constitutes a taking in two different ways, by physical occupation and by regulation, are not separate claims. They are rather separate arguments in support of a single claim--that the ordinance effects an unconstitutional taking. Having raised a taking claim in the state courts, therefore, petitioners could have formulated any argument they liked in support of that claim here .... A litigant seeking review in this Court of a claim properly raised in the lower courts thus generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below.

Id. at 534-35.[1]

Most telling of all is the fact that the decision below categorically stated that "there is no federally protected property interest on which to base a procedural due process claim." App. A-39. Thus, whether or not the Clarks used the same language to explain their theory that the ownership of property gives rise to an entitlement of due process, the court below issued a ruling that forecloses any permutation of that argument. "Our practice 'permit[s] review of an issue not pressed so long as it has been passed upon.'" *Lebron*, 115 S. Ct. at 965. The court below said that there is "no" protected property interest here. The Clarks must be given an opportunity to demonstrate that they *do* have a protected property interest and should not be restricted to describing that interest using only the exact same word choices used before the lower courts. As explained in the petition and *infra*, other circuits have found that land

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[1] In *Yee*, of course, this Court did not address the new theory because it had not been raised in the petition for certiorari. *Id.* at 538. But this Court made it plain that if *Yee* had raised the argument in the petition stage, then this Court *could* have granted certiorari and heard argument on the regulatory taking claim. *Id.* at 535.

ownership in and of itself is a protected property interest. This issue is properly before this Court and in need of review.

C. There Is a Substantial Conflict Among the Circuits and the California Court

The City of Hermosa Beach's (City) argument that there is no conflict with the Seventh Circuit opinion in *River Park, Inc. v. City of Highland Park*, 23 F.3d 164 (7th Cir. 1994), relies entirely on a mischaracterization of that decision. The District Court had denied River Park's claim based on the denial of its rezoning request, holding that River Park had no "legitimate claim of entitlement" in the rezoning it sought. *Id.* at 165.

On review, the Seventh Circuit acknowledged that "[f]or reasons the district court gave, River Park may well have lacked a property interest in one classification rather than another." *Id.* at 165-66. Nevertheless, in stark contrast to the many circuits, and the California court in this case, the Seventh Circuit held:

> But it [River Park] surely had a property interest in the land, which it owned in fee simple, and it is therefore entitled to contend that the City's regulation of that land deprived it of property without due process.

Id. at 166.

It stretches credulity to suggest that the Seventh Circuit is in accord with the other circuits or that *River Park* does not count. The Seventh Circuit was clear in stating the property interest protected by procedural due process derives from land ownership, it does not derive from a perceived entitlement that the state may alter at will.

The conflict raised by the Third Circuit in *DeBlasio v. Zoning Board of Adjustment for the Township of West Amwell*, 53 F.3d 592 (3d Cir. 1995), is equally apparent. As in *River Park*, the court noted that the zoning board had discretion to grant or deny the requested zoning variance. *Id.* at 597. Nonetheless, the court assumed DeBlasio had a protected property interest in his land and rejected his procedural due process claim on other grounds. *Id.* at 596-98. When the Third Circuit examined DeBlasio's substantive due process claim, the court held:

> We think it consistent with *Bello* to conclude that ownership is a property interest worthy of substantive due process protection .... Indeed, one would be hard-

> pressed to find a property interest more worthy of substantive due process protection than ownership.

Id. at 600-01.

That this standard applied equally to procedural due process in the Third Circuit is evident from that court's statement implying protected property interests under substantive due process are more limited than under procedural due process. "[I]t is apparent ... that, in this circuit at least, not all property interests worthy of procedural due process protection are protected by the concept of substantive due process." *Id.* at 598.

Thus, in the Seventh and Third Circuits, land ownership is a protected property interest under both procedural and substantive due process. California property owners, however, do not enjoy such constitutional protection.

D. The Court Below Misapplied *Roth*

Board of Regents v. Roth, 408 U.S. 564 (1972), was not a land use case. The significance of *Roth* is that for the first time this Court held procedural due process should attach *not only* to restrictions imposed on the holders of traditional property interests such as land ownership, *but also* to the denial of government benefits to persons with certain entitlements, such as continued employment. This Court stated: "The Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." *Id.* at 571-72.

The reason why the Clarks' desire to replace their duplex with condominiums should be treated differently than the professor's desire for continued employment is that the Clarks were exercising their inherent right to use their land, whereas the professor sought only to enforce a perceived benefit conferred by the government. In a land use case, a permit is a restriction on an already protected entitlement to use land.[2] In a government benefits case, there is no entitlement except what the government confers.

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[2] As this Court has stated elsewhere: "But the right to build on one's own property--even though its exercise can be subjected to legitimate permitting requirements--cannot remotely be described as a 'government benefit.'" *Nollan v. California Coastal Commission*, 483 U.S. 825, 833 n.2 (1987).

This Court has always operated on the assumption that land ownership is a protected property interest for due process purposes. *See* Petition at 15. Respondents cite no cases from this Court that support their contention that (1) *Roth* applies to land ownership or (2) land ownership is not a property interest protected by the Due Process Clause. In a telling statement about the effect of this Court's decision in *Roth*, the Second Circuit opined:

> It is not readily apparent why land regulation cases that involve applications to local regulators have applied the *Roth* entitlement test to inquire whether an entitlement exists in what has been applied for--whether a zoning variance, a business license, or a building permit--instead of simply recognizing the owner's indisputable property interest in the land he owns.

RRI Realty Corp. v. The Incorporated Village of Southampton, 870 F.2d 911, 917 (2d Cir. 1989).

E. No Authority Holds That a Section 1983 Action for a Violation of Federal Constitutional Rights Will Not Lie When a State Writ of Mandamus Is Available

The City cites *DeBlasio v. Zoning Board of Adjustment*, 53 F.3d at 592, for the proposition that "the remedy for ... denial of a fair hearing [] generally lies in state court." Opposition at 18. The significance of this proposition is obscure, given that the Clarks *did* in fact file this action in California Superior Court. Claims brought under 42 U.S.C. § 1983 can be, and routinely are, brought in state court. Nothing in *DeBlasio* supports the City's claim that the Clarks are limited to a mandamus remedy.

The same difficulty confronts the City's citation to *River Park, Inc.* Even if it is true that the remedy for a "failure to implement state law" lies "in state court," that is exactly where this action was filed! Nothing in the cited language from *River Park* suggests that damages for violation of the federal constitutional right to a fair hearing are barred merely because there exists a state procedure to win a new hearing. Neither this Court, nor any court cited by the City, has held the only remedy available for violation of the constitutional right of due process is a new hearing. Citizens who incur financial injury by reason of the City's violation of their constitutional rights have a right under 28 U.S.C. § 1983 to recoup those damages.

The utter absence of any authority supporting the City's position is consistent with the fact that administrative mandamus is ***not*** "clearly an adequate remedy" for the deprivation of federal constitutional rights. Opposition at 20. In fact, this Court has already considered this issue and rejected the City's argument in the analogous context of regulatory takings.

In *Agins v. City of Tiburon*, 24 Cal. 3d 266, 598 P.2d 25 (1979), the California Supreme Court held that California cities could not be sued for damages for violating the Fifth Amendment so long as aggrieved citizens had access to the alternative remedies of declaratory relief or mandamus. 24 Cal. 3d at 269-70, 598 P.2d at 26. This doctrine was rejected in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), where this Court held that invalidation was ***not*** a sufficient remedy for the violation of federal constitutional rights under the Takings Clause. 482 U.S. at 318-19. The same reasoning should apply in rejecting the City's attempted resurrection of *Agins* in a due process context.

The court below found that the City willfully (after consulting counsel) engaged in conflicts of interest (App. A-8, A-22), deprived the Clarks of their right to a fair hearing (App. A-22-24), and exhibited bias and partiality against the Clarks in its official actions (App. A-23, A-24). Yet the only relief granted by the California court was to issue a writ of mandate requiring the City to repeat the process by conducting a new hearing! App. A-24-25.

F. The Court Below Wrongly *Identified* the "Arbitrary or Irrational Conduct" Standard with the "Shocks the Conscience" Standard

The City plays semantic games by asserting that the court below "found" the City's actions were not "arbitrary or irrational." Opposition at 23. It is true that the decision of the Court of Appeal includes the statement. Yet, in arriving at its conclusion that the City's conduct did not violate the Due Process Clause, the court consistently applied the "shocks the conscience" standard *as its due process test*: (1) "[T]he Due Process Clause ... prevents the government from engaging in conduct that 'shocks the conscience.'" App. A-31 n.28 (citations deleted); (2) "[D]ue process prevents ... 'abuse of government power that shocks the conscience.'" *Id.* at A-41 (citations deleted); (3) The standard for judging a due process claim

"is whether the challenged government action would 'shock the conscience' of ... judges." *Id.* at A-42 (citations deleted); (4) "[P]laintiff must ... demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking." *Id.* (citations deleted); (5) "[T]he 'shock the conscience' standard requires a high level of outrageousness." *Id.* (citations deleted); and (6) "[W]e cannot say that its conduct, for due process purposes, was arbitrary or oppressive or that it "'shocks the conscience.'" *Id.* at A-43 (citations deleted).

As these passages illustrate, the Court of Appeal was explicit in applying the "shocks the conscience" test *as a proxy* for the "arbitrary and irrational" inquiry. In effect the court below conflated the two tests into one, finding that *because* the City's conduct did not shock the conscience of the court, the conduct *therefore* was not arbitrary or irrational. The City's claim that the Court of Appeal actually applied the "arbitrary and irrational" standard to the facts of this case--independently of the "shocks the conscience" inquiry--and found that the City's conduct did not violate this standard, is belied by a fair reading of the opinion.

G. The Court Below Inexplicably Applied the "Shocks the Conscience" Standard to Complaints About Procedural Violations

Not only did the court below conflate the "shocks the conscience" and the "arbitrary and irrational" standards, but it applied these standards to what are essentially complaints about *procedure*. Although the decision below spent much time reviewing the nature of substantive due process, *id.* at A-39-44, when it actually came to apply these tests, it applied them to *procedural* violations:

> [W]e cannot say that its [the city council's] conduct for due process purposes, was arbitrary or oppressive or that it "shocks the conscience." Although we have concluded that Councilmember Benz had a conflict of interest ... the Council did not act irrationally by allowing Benz to participate in the proceedings.

Id. at A-43. It is to this odd application of conflated substantive due process standards to a procedural complaint that the Clarks object and for which there is a genuine conflict in the lower courts. Petition at 21-22. The lower courts must understand that when the right to use property is subject to a permitting process, that process should

meet the standards of *Matthews v. Eldridge*, 424 U.S. 319 (1976), and its progeny rather than the wholly inappropriate standards of substantive due process formulated in the context of law enforcement-related violations of liberty interests. *See* Petition at 20 n.7 and 21.

CONCLUSION

The ability to make use of property is a right protected by the Constitution. Restrictions imposed upon the exercise of that right must be fair and subject to examination under meaningful standards of due process--*whether or not the landowner has a vested right to a particular permit*. In this case, it is beyond dispute that the procedures employed by the City were unfair and a violation of California law. Yet the Court found that there had been no due process violation because the landowner lacked a nondiscretionary right to a particular permit. Two federal circuits have plainly held that due process attaches in the land use context because the right being affected is the right to own and make use of property. Other circuits and the court below disagree. This Court should grant certiorari to resolve this conflict.

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Respectfully submitted,

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